

RA7

MEMORANDUM

Department of Planning and Neighborhood Services



To: Honorable Mayor and City Council
Through: Thomas J. Wilson, City Manager
From: Tambri Heyden, Acting PNS Director *Tambri Heyden*
By: Felix J. Reliford, Principal Housing Planner
Subject: **Apton Plaza Project Information Summary**
Date: **April 27, 2004**

APTON PLAZA PROJECT INFORMATION SUMMARY

Project Developer/Owner: Apton Properties, LLC

Project Description: Demolition and redevelopment of the 2.23-acre site at the northeast corner of North Main Street and Weller Lane. Construction of 96 rental apartment units of which 19 units (20%) will be deed restricted for very low and moderate-income persons. The project will also include 3,000 square feet of commercial retail on the ground floor. Landscaping and street improvements will be constructed along North Main Street and Weller Lane. The project will be located adjacent to the proposed Milpitas Library site.

Proposed Agency Assistance: Agency assistance consisting of grants and loans to facilitate the development of the 19 deed-restricted affordable housing units: 9 very low income units, and 10 moderate-income units. Also, agency assistance will include 20% of the total City Fees to support and assist the affordable housing units.

Development Grant: \$852,560

Affordable Housing Subsidy	\$722,000
<u>City Development Fee Subsidies</u>	
Building Permit Fees	\$29,600
Park In-Lieu	\$43,000
Traffic Mitigation	\$3,800
Private Job Account	\$10,200
School Impact Fees	\$43,960
	<u>\$852,560</u>

Total Value of Grants: \$852,560

Total Value of Agency Assistance: **\$1,230,560**
(grant and loan)

PROJECT BENEFITS

Tax Increment Generation:

\$2,805,000 current value of land and improvements (annual property tax-approximately \$28,050)	
Estimated post development valuation:	\$13,473,500
Estimated annual post development property tax over base:	\$134,300
Estimated annual post development Redevelopment Agency proceeds:	\$107,800

Recovery Period: Grant Assistance: Approximately 8 years

<u>Housing Units:</u>	96 new residential apartment units 19 Deed-Restricted Affordable Units (20%)
<u>Sales Tax:</u>	From 3,000 sq. ft. Commercial Retail

Jobs: 78 construction jobs over an eighteen months period

Ratio of Agency assistance vs. private investment: In excess of 1:11

RESOLUTION NO. RA

**A RESOLUTION OF THE MILPITAS REDEVELOPMENT AGENCY APPROVING THE
EXECUTION OF A MEMORANDUM OF UNDERSTANDING WITH APTON PLAZA, LLC.**

WHEREAS, the City Council of the City of Milpitas originally approved and adopted the Redevelopment Plan (the "Redevelopment Plan") for the Milpitas Redevelopment Project No. 1 (the "Project") on September 21, 1976, by Ordinance No. 192 and amended on September 4, 1979, by Ordinance No. 192.1; on May 4, 1982, by Ordinance No. 192.2; on November 27, 1984, by Ordinance No. 192.3; on December 9, 1986, by Ordinance No. 192.4; on April 16, 1991, by Ordinance No. 192.6A; on December 9, 1994, by Ordinance No. 192.9; on October 15, 1996, by Ordinance No. 192.11; on June 17, 2003, by Ordinance No. 192.14; and

WHEREAS, the Milpitas Redevelopment Agency (the "Agency") is engaged in activities to implement the Redevelopment Plan for the Project; and

WHEREAS, Apton Properties, LLC has an option to purchase certain real property located within the boundaries of the Project Area and desires to construct improvements on the site; and

WHEREAS, the Agency and Apton Properties, LLC desire to enter into a Memorandum of Understanding to provide certain financial assistance for the development of affordable housing units on the site; and

WHEREAS, the provisions of affordable housing are consistent with the Redevelopment Plan and state law;

NOW, THEREFORE, be it resolved by the Milpitas Redevelopment Agency that the Agency hereby approves a Memorandum of Understanding and authorizes the execution of said agreement.

PASSED AND ADOPTED this 18th day of May, 2004, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Gail Blalock, Agency Secretary

Jose S. Esteves, Chairperson

APPROVED AS TO FORM:

Steven T. Mattas, Agency Counsel

RA 7

**MEMORANDUM OF UNDERSTANDING
(Apton Plaza)**

THIS MEMORANDUM OF UNDERSTANDING is entered into by and between the Redevelopment Agency of the City of Milpitas, a public body, corporate and politic (hereinafter "Agency") and Apton Properties, L.L.C., a California limited liability company (hereinafter "Participant") (collectively the "Parties").

RECITALS

WHEREAS, Participant is the property owner of that real property located at 230 North Main Street, Milpitas, more particularly described in the legal description attached hereto as Exhibit A attached herein and incorporated herein by this reference ("the Property").

WHEREAS, Participant intends to develop a mixed-use project on the Property that consists of approximately 96 residential units ("the Project").

WHEREAS, this MOU sets forth the Parties' agreement with respect to Participant's affordable housing obligations with respect to the Project and further sets forth additional conditions for the development of a housing project on the property and the rights and duties of the Parties respectively.

WHEREAS, this MOU will result in the construction of 19 affordable housing units.

WHEREAS, the Parties intend to enter into an Owner Participation Agreement ("OPA") at a later date that will incorporate the terms of this MOU, set forth additional conditions for the development of the Project, and be recorded against the Property.

WHEREAS, this MOU, the OPA, and the construction of the 19 affordable housing units are intended to satisfy the requirements of the Housing Element Policy C-I-2 of the Milpitas General Plan and the Agency's obligations under the Community Development Law with respect to the creation of affordable housing.

WHEREAS, in the event of conflict between the terms of the OPA and the terms of this MOU, this MOU shall control on the point of conflict.

TERMS

NOW THEREFORE, in consideration of the foregoing recitals and the mutual covenants and conditions contained herein and other good and valuable consideration the Parties understand and agree as follows:

I. AGENCY FINANCIAL ASSISTANCE:

The amount of the Agency Financial Assistance to the Project detailed below is based on the Agency's estimate that the assessed valuation of the Project (land and improvements) will exceed Twenty-Two Million Four Hundred Ten Thousand Eight Hundred Eighteen Dollars_(\$22,410,818). Should the estimated assessed valuation for Project not exceed this amount, Participant agrees that the Agency's obligation to provide the assistance set forth below shall be reduced in proportion to the assessed valuation for the completed Project.

1. The Agency agrees to pay on behalf of the Participant direct City of Milpitas ("City") costs related to the processing of zoning entitlements and construction permits for nineteen (19) deed restricted, rental apartment units ("Affordable Units"). This amount shall be equal to 20% of the total of such costs for the project as a whole, but shall not exceed Thirty Nine Thousand Eight Hundred Dollars (\$39,800).

2. The Agency agrees to pay on behalf of the Participant park in-lieu and traffic mitigation fees for the Affordable Units. This amount shall be equal to 20% of the total of such fees for the project as a whole but shall not exceed Forty Six Thousand Eight Hundred Dollars (\$46,800).

3. The Agency shall reimburse Participant for School Impact Fees for the Affordable Units in an amount. This amount shall be equal to 20% of the total of such costs for the project as a whole but shall not exceed Forty Three Thousand Nine Hundred Sixty Dollars (\$43,960). The Agency shall make the reimbursements within thirty (30) days of Participant providing Agency with evidence from the school district(s) that the School Impact Fees have been paid.

4. The Agency will provide a grant in the amount not to exceed Seven Hundred Twenty-Two Thousand Dollars (\$722,000) to the developer for the construction of the Affordable Units.

5. The Agency will provide a take-out loan in an amount not to exceed Three Hundred Seventy Eight Thousand Dollars (\$378,000) to the developer upon the completion of construction of the Affordable Units. The loan will be a 20-year fixed rate loan at an interest rate of 5.25% per annum, secured by the Property. The Agency agrees that its loan would be subordinate to other financing, provided such subordination is consistent with the Community Redevelopment Law.

6. Summary of Agency Assistance:

A. Total Potential Value of Agency Assistance - \$1,230,560.00

1. Value of Grants - \$852,560.00

a. Estimated Grants for 19 Affordable Units

Building Permit Fees (*)	\$29,600
Private Job Account (Staff Charges) (*)	\$10,200
Park In-Lieu (*)	\$43,000
Traffic Mitigation (*)	\$3,800
School Impact Fee (*)	\$43,960
Affordable Housing Assistance	\$722,000
(*) 20% of City Fees	
	<hr/>
	\$852,560

2. Estimated Value of Loans - \$378,000.00	
Affordable Housing Assistance	\$378,000
	<hr/>
	\$378,000

II. AFFORDABLE HOUSING IMPLEMENTATION:

1. The Participant shall provide nineteen (19) Affordable Units constructed on the Property, which shall be rented to Very Low and Moderate Income households as guaranteed by deed restrictions or other enforceable covenants running with the land. Nine (9) of the Affordable Units will be designated for Very Low-Income households. Ten (10) of the Affordable Units will be designated for Moderate-Income households. The terms "Very Low Income households" and "Moderate Income households" shall have the same meaning given those terms in the Community Redevelopment Law (Health and Safety Code, §§ 33000 *et seq.*) and Health and Safety Code section 50052.5.
2. Participant shall be required to submit to the Agency an initial Disbursement Plan that indicates the location of the Affordable Units within the development. The Disbursement Plan is subject to the approval of the Executive Director of the Agency, or his or her designee. However, the parties agree that the Affordable Units will be distributed throughout the development as conceptually shown on the Site Map and Preliminary Distribution Plan in Exhibit B attached hereto and incorporated herein by this reference. This Agreement contemplates that from time to time, Participant or its successor may designate different units than shown in the initial Disbursement Plan as Very Low Income or Moderate Income units. Such redesignation may be made provided the following conditions are met:
 - a. The total number of Very Low Income units shall at no time be less than nine (9), nor the total number of Moderate Income units shall at no time be less than ten (10) at any time.
 - b. The designated Affordable Units shall be dispersed throughout the project so that the distribution of the Affordable Units is substantially the same as shown in the initial Disbursement Plan; and
 - c. Participant or its successor shall notify the Agency in writing at least thirty (30) days in advance of any such redesignation. Unless the Agency rejects the Participant's proposal to redesignate any unit pursuant to this section within fifteen (15) business days of the notice, the redesignation shall be deemed to have been approved by the Agency. The Agency Executive Director may reject the redesignation if he or she determines, in his or her sole discretion, that the redesignation would result in a concentration of Affordable Units in any particular location within the project.
3. The Agency and Participant hereby declare their understanding and intent that the

burdens of the covenants set forth herein touch and concern the land in that the Agency's and Participant's legal interest in the Property is rendered less valuable thereby. The Agency and Participant hereby further declare their understanding and intent that the benefits of such covenants touch and concern the land by enhancing and increasing the enjoyment and use of the Property by persons to whom the Affordable Units will be affordable, the future tenants of each Affordable Units ("Applicant(s)").

4. Upon completion of the Project, the Property shall be subject to the Regulatory Agreement in substantially the form set forth in Exhibit C. The Regulatory Agreement shall be recorded against the Property. Following recordation of the Regulatory Agreement as required hereunder, the Agency shall have the right to enforce the Regulatory Agreement and, upon default under any of the terms of the Regulatory Agreement, the Agency may take any one or more of the following steps, in addition to all other remedies provided by the law or in equity:
 - (1) Enforce the obligations under the Regulatory Agreement by mandamus or other suit, action, or proceeding at law or in equity; including injunctive relief, require the Owner, or any successor in interest, to perform its obligations and covenants under this Agreement or under the Regulatory Agreement; or, enjoin any act or thing that may be unlawful or in violation of the provision of this Agreement, the OPA, or the Regulatory Agreement; and
 - (2) Take such other action at law or in equity as may appear necessary or desirable to enforce the obligations under this MOU, the OPA, and the Regulatory Agreement against the Owner; and
5. Rents for Affordable Units shall be determined pursuant to the terms of the Regulatory Agreement.
6. The Agency shall develop a plan to qualify purchasers for rental of the Affordable Units and will be responsible for providing the Participant with a list of qualified Tenants, as set forth in the Regulatory Agreement. Participant agrees to use its best efforts to market the Affordable Units to the same extent and in the manner as those being developed on the Property that are not designated as Affordable Units. The certification and recertification of household size and income required by the Regulatory Agreement shall be administered by either the Agency, or by the Housing Authority of Santa Clara County, or some other entity as designated by the Agency pursuant to an agreement with the Agency.
7. This MOU may be executed in counterparts, all of which together shall constitute a single original agreement, so executed this MOU shall constitute an agreement which shall be binding upon all parties to the MOU, notwithstanding that the signatures of all parties do not appear on the same page.
8. This MOU, the OPA and the Regulatory Agreement shall run with the Property and be binding to the Parties hereto and their successors and assigns.

9. Either Party shall be deemed in default of this MOU when failing to substantially comply with any material term of this MOU. Failure to cure a default within 30 days' written notice provided to the defaulting party by the non-defaulting party shall result in immediate termination of this MOU and any development rights granted by the City as a result thereof.
10. If any term or provision of this MOU shall be held invalid or unenforceable, the *remainder shall not be affected*.
11. No waiver or breach of any covenant or provision shall be deemed a waiver of any other covenant or provision and no waiver shall be valid unless in writing and executed by the waiving party.
12. This MOU may be executed in one or more counterparts, each of which shall be deemed an original and all which taken together shall constitute one and the same instrument.
13. This MOU may not be amended or altered except by a written instrument executed by Agency and Apton Properties, LLC.

[EXECUTION PAGE FOLLOWS]

IN WITNESS WHEREOF, Agency has by order of the Agency Board of the Directors caused this Memorandum of Understanding to be subscribed by the Executive Director of the Agency by Resolution No. _____ and attested by the City Clerk thereof, and Apton Properties, LLC has executed the same this 12 day of May, 2004.

"AGENCY"

Redevelopment Agency of the
City of Milpitas

Thomas J. Wilson, Executive Director

Attest:

Gail Blalock, City Clerk

Approved as to Form:

Agency Counsel

Apton Properties, L.L.C.

By: Badr M Valami
Its: Manager

EXHIBIT A

Legal Description of the Property

EXHIBIT B

Preliminary Distribution Plan

EXHIBIT C

REGULATORY AGREEMENT FOR AFFORDABLE RENTAL UNITS

**Recording requested by and
When recorded, mail to:**

Milpitas Redevelopment Agency
455 East Calaveras Blvd.
Milpitas, California 95035
Attn: Executive Director

NO FEE DOCUMENT PURSUANT TO
GOVERNMENT CODE SECTIONS 6103 and 27383

REGULATORY AGREEMENT
(Apton Properties, L.L.C.)

THIS REGULATORY AGREEMENT (the “**Agreement**”) is entered into effective as of _____, 2004 (the “**Effective Date**”) by and between the Milpitas Redevelopment Agency, a body both corporate and politic (the “**Agency**”), and Apton Properties, L.L.C., a California limited liability company (“**Owner**”). Owner and the Agency are referred to as the “**Parties**.”

RECITALS

A. Owner owns that real property located at 230 North Main Street in Milpitas, which is more particularly described in the Exhibit A attached to this Agreement (the “**Site**”), upon which Owner intends to develop 96 units of rental multi-family housing (the “**Project**”).

B. Agency has provided financial assistance in the development of the Project. Agency’s activities in this regard are designed to implement Agency’s effort to assist persons and families of Very Low, Low and Moderate Income to purchase residential property and to increase, improve and preserve the supply of Very-Low, Low and Moderate Income housing available in the City in accordance with Community Redevelopment Law Health and Safety Code Section 33000 et seq.

C. The Property is located within the Milpitas Redevelopment Project Area.

D. The Agency and the Participant have executed an Owner Participation Agreement of even date herewith (“**OPA**”) which establishes the rights and obligations of the parties with respect to development of the Property. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the OPA, and, in the event of a conflict between the OPA and this Agreement, this Agreement shall control.

E. The OPA provides for the construction on the Property of a project that includes a minimum of nine (9) units of rental housing affordable to Very Low Income Tenants and ten (10) units of rental housing affordable to Moderate Income Tenants (the “**Project**”) as set forth in this Agreement.

F. The Agency's financial assistance and the use and affordability restrictions imposed by the Agency have enabled Owner and eligible Tenants hereinafter defined to rent the Assisted Units, as hereinafter defined, with financial assistance provided for in the OPA and at a price established in the OPA. In exchange for Agency's assistance, Owner and any successor in interest agrees to the restrictions on the rents and occupancy of the Property imposed by this Agreement.

NOW THEREFORE, IN CONSIDERATION of the mutual agreements, obligations, and representations, and in further consideration for the aforementioned funding, Owner and Agency hereby agree as follows:

1. **OWNER'S OBLIGATIONS**

1.1. **USE AND AFFORDABILITY RESTRICTIONS.** Owner hereby covenants and agrees, for itself and its successors and assigns, that the Property shall be used solely for the construction and operation of a 96-unit multifamily rental housing and mixed use development in compliance with the development approvals granted by City and the requirements set forth herein. Owner represents and warrants that it has not entered into any agreement that would restrict or compromise its ability to comply with the occupancy and affordability restrictions set forth in this Agreement, and Owner covenants that it shall not enter into any agreement that is inconsistent with the terms hereof without the express written consent of City. Notwithstanding the foregoing or anything to the contrary contained herein, if the terms of financing for the Project require greater affordability restrictions than those imposed hereby, the requirements of such other financing shall prevail for the term thereof.

1.2. **AFFORDABILITY REQUIREMENTS.**

1.2.1. **Nine Very Low Income Units.** For a term of fifty-five (55) years commencing upon the Effective Date, no fewer than nine (9) of the dwelling units in the Project shall be both rent-restricted and occupied (or if vacant, available for occupancy) by households whose income does not exceed fifty percent (50%) of Area Median Income as adjusted for household size. A dwelling unit shall qualify as "**rent-restricted**" under this subsection if the gross rent charged for such unit does not exceed thirty percent (30%) of fifty percent (50%) of Area Median Income as adjusted for Assumed Household Size.

1.2.2. **Ten Moderate Income Units.** For a term of fifty-five (55) years commencing upon the Effective Date, no fewer than ten (10) of the dwelling units in the Project shall be both rent-restricted and occupied (or if vacant, available for occupancy) by households whose income does not exceed one hundred twenty percent (120%) of Area Median Income as adjusted for household size. A dwelling unit shall qualify as "**rent-restricted**" under this subsection if the gross rent charged for such unit does not exceed thirty percent (30%) of one hundred twenty percent (120%) of Area Median Income as adjusted for Assumed Household Size.

1.2.3. The dwelling units described in subsections 1.2.1. and 1.2.2 are referred to

collectively as the “**Assisted Units.**” Occupants of the dwelling units described in subsections 1.2.1. and 1.2.2 are referred to as “**Tenants.**”

1.2.4. The term “**Area Median Income**” shall mean the median gross annual income for households in Santa Clara County, adjusted for household size, as annually estimated by the United States Department of Housing and Urban Development pursuant to Section 8 of the United States Housing Act of 1937 or as published in Section 6932 of Title 25 of the California Code of Regulations or successor provision published pursuant to California Health and Safety Code Section 50093(c).

1.2.5. “**Assumed Household Size**” shall be based on the size of the unit as follows:

<u>Size of Units</u>	<u>Assumed Household Size</u>
One Bedroom	2
Two Bedrooms	3
Three Bedrooms	4
Four Bedrooms	5

1.3. **INCOME CERTIFICATION AND RECERTIFICATION.** The income levels and other qualifications of prospective Tenant applicants for Assisted Units shall be certified prior to initial occupancy and recertified on an annual basis thereafter. The Owner and the Agency shall cooperate in establishing procedures for initial certification of applicants, maintenance of the waiting list of certified applicants, and annual recertification of Tenants. The Agency (or its designee) shall be responsible for initial certification of Tenant income, maintenance of waiting lists, and annual recertifications. The Agency shall use its reasonable best efforts to maintain a current list of eligible prospective tenants but, in no event, shall the Agency be liable to Owner for its failure to provide Owner with a list of prospective applicants. Nothing in this Agreement shall prohibit Owner from identifying prospective tenants, provided that such prospective tenants’ eligibility shall be certified by the Agency (or its designee) prior to leasing. In the event that recertification of a Tenant’s income indicates that the Tenant’s income exceeds the maximum designated for the Tenant’s applicable income category, such household shall no longer qualify as a Tenant in the applicable income category, and the Owner, in compliance with section 2.2.2, will rent the next available Unit of comparable size to a Tenant in that income category. Upon the Agency’s request, Owner shall rent the next available Unit of a smaller size in the event that no Unit of comparable size is available for rent within the 60-day period following the Tenant’s decertification. Any agency request that Owner rent a smaller unit shall be deemed approval of the redesignation of the unit pursuant to section 2.2.2. No tenant in the Project shall be denied continued occupancy in the Project because, after occupancy, such tenant’s household income increases such that the income for such household will no longer qualify such tenants in the applicable income category.

1.4. **SECTION 8 CERTIFICATE HOLDERS.** The Owner will accept as tenants, on the same basis as all other prospective tenants, persons who are recipients of federal certificates for rent subsidies pursuant to the existing housing program under Section 8 of the

United States Housing Act of 1937, or its successor. The Owner shall not apply selection criteria to Section 8 certificate or voucher holders that are more burdensome than criteria applied to all other prospective tenants, nor shall the Owner apply or permit the application of management policies or lease provisions with respect to the Development which have the effect of precluding occupancy of units by such prospective tenants.

1.5. CONDOMINIUM CONVERSION. The Owner may convert Project units to condominium or cooperative ownership or sell condominium or cooperative conversion rights to the Site during the term of this Regulatory Agreement. However, absent an amendment to this Agreement, in the event of a condominium conversion, the restrictions set forth in this Agreement shall continue in effect, and the Assisted Units shall continue to be rented to and occupied by very low-income and moderate-income households, as the case may be, during the term of this Agreement.

1.6. NONDISCRIMINATION. The Owner shall not discriminate against any Tenant (or prospective Tenant) or segregate in the use, enjoyment, occupancy, conveyance, lease, sublease, or rental of Project units on the basis of race, color, ancestry, national origin, religion, sex, sexual preference, age, marital status, family status, source of income, physical or mental disability, Acquired Immune Deficiency Syndrome (AIDS), or AIDS-related conditions (ARC), or any other arbitrary basis. Owner shall include a statement in all advertisements, notices and signs for the availability of Development units for rent to the effect that Owner is an Equal Housing Opportunity Provider.

2. PROPERTY MANAGEMENT

2.1. MANAGEMENT RESPONSIBILITIES AND TENANT LEASES. The Owner is responsible for all management functions with respect to the Project, including without limitation the selection of tenants, evictions, collection of rents and deposits, maintenance, landscaping, routine and extraordinary repairs, replacement of capital items, and security. The Agency shall have no responsibility over management of the Project. Each lease pertaining to an Assisted Unit shall contain a provision to the effect that the Owner and the Agency have relied on the income certification and supporting information supplied by the Tenant in determining qualification for occupancy of the Assisted Unit, and that any material misstatement by the Tenant in such certification (whether or not intentional) shall be cause for immediate termination of such lease. Each lease shall also contain a provision that failure to cooperate with the annual recertification process instituted by the Owner and Agency pursuant to Section 1.3 above, shall provide grounds for termination of the lease.

2.2. PROVISION OF ASSISTED UNITS.

2.2.1. All of the Assisted Units shall be designed and constructed in a manner similar to, and to the same standards as, those other Units in the Project. To the extent required by State and Local regulations, each Assisted Unit shall contain separate and distinct facilities for living, sleeping, eating, cooking, and sanitation for a single person or family, including a sleeping area, bathing and sanitation facilities and cooking facilities equipped with a cooking range,

refrigerator, and sink.

2.2.2. Those Units designated as Assisted Units shall be dispersed throughout the Project with respect to both location and number of bedrooms as shown on Exhibit B, attached hereto and incorporated by reference herein. Owner, prior to issuance of Building Permits, shall submit to Agency for approval a Disbursement Plan showing the location of each Assisted Unit. Owner may designate different units than shown in the Disbursement Plan as Assisted Units provided that (a) the total number of Assisted Units is at all times no less than nineteen (19) and (b) the Agency Executive Director determines that the Assisted Units are disbursed throughout the Project such that the distribution is substantially the same as shown in the Final Disbursement Plan. At least 30 days prior to the proposed redesignation, the Owner shall notify the Agency of the proposed redesignation pursuant to section 3.10 of this Agreement, which notice shall contain a current disbursement plan that shows the then-current location of the Assisted Units and indicate the location of the proposed location of the Assisted Units. The Agency Executive Director may reject the proposed redesignation if he or she determines, in his or her sole discretion, that the redesignation would result in a concentration of Assisted Units in any particular location within the Project. Unless the Agency rejects the Owner's proposed redesignation pursuant to this section within fifteen (15) business days of the notice, the Agency shall be deemed to have approved the redesignation.

2.2.3. No Assisted Unit shall be occupied by the Owner, its residential manager or maintenance personnel.

2.3. **INSPECTION AND RECORDS.** The Owner shall maintain records that clearly document the Owner's performance of its obligations to operate the Project under the terms of this Agreement. The Owner shall submit copies of any such records to the Agency within ten (10) business days of the Agency's request. The Owner shall permit the Agency to enter and inspect the Project during ordinary business hours for compliance with obligations under this Agreement upon twenty-four (24) hours reasonable advance notice of such visit by the Agency to the Owner or Owner's management agent and to tenants of any Project units.

2.4. **FEES, TAXES, AND OTHER LEVIES.** Owner shall be responsible for payment of all fees, assessments, taxes, charges and levies imposed by any public authority or utility company with respect to the Site, and shall pay such charges prior to delinquency.

3. **GENERAL PROVISIONS**

3.1. **RECORDATION; NO SUBORDINATION.** This Agreement shall be recorded in the official records of Santa Clara County. Owner hereby represents, warrants and covenants that with the exception of the Ground Lease and easements of record, absent the written consent of City, this Agreement shall not be subordinated in priority to any lien (other than those pertaining to taxes or assessments), encumbrance, or other interest in the Property or the Project. If at the time this Agreement is recorded, any interest, lien, or encumbrance has been recorded against the Project in position superior to this Agreement, upon the request of City, Owner hereby covenants and agrees to promptly undertake all action necessary to clear such matter from title or to

subordinate such interest to this Agreement, and to provide such evidence thereof as City may reasonably request.

3.2. DEFAULT AND REMEDIES. In the event of any breach of any agreement or obligation under this Agreement by the Owner, the Agency shall provide written notice to Owner of such breach. Owner shall have an opportunity to cure such breach within thirty (30) days from the Owner's receipt of such written notice or such longer period of time as the Agency reasonably determines is necessary to cure the breach if the Owner diligently undertakes to cure such breach. If the Owner fails to perform a timely cure of the specified breach, the Agency may proceed with any or all of the following remedies upon the Owner's failure to cure:

3.2.1. Bring an action in equitable relief seeking the specific performance by Owner of the terms and conditions of this Regulatory Agreement, and/or enjoining, abating, or preventing any violation of said terms and conditions, and/or seeking declaratory relief;

3.2.2. Pursue any other remedy allowed at law or in equity.

3.3. NON-LIABILITY OF OFFICIALS, EMPLOYEES AND AGENTS. No officer, employee or agent of the Agency shall be personally liable to Owner for any obligation created under the terms of this Agreement except in the case of fraud or willful misconduct by such person.

3.4. INDEMNITY. Owner shall indemnify and hold the Agency, its officers, employees, and agents free and harmless against any losses, damages, liabilities, claims, demands, judgments, actions, court costs, and legal or other expenses (including attorneys' fees) which the Agency may incur as a direct or indirect consequence of Owner's failure to perform any obligations as and when required by this Regulatory Agreement. This indemnity obligation shall not extend to any claim arising solely from the gross negligence or willful acts of the Agency, its agents, and its employees. Owner's duty to indemnify the Agency shall survive the term of this Regulatory Agreement.

3.5. GOVERNING LAW. This Agreement shall be interpreted under and be governed by the laws of the State of California, except for those provisions relating to choice of law and those provisions preempted by federal law.

3.6. AGREEMENT CONTROLS. In the event that any provisions of this Agreement and any other agreement entered into by the Agency and the Owner, the terms of this Agreement shall control.

3.7. ATTORNEYS' FEES AND COSTS. In the event that any legal or administrative action is commenced to interpret or to enforce the terms of this Agreement, the prevailing party in any such action shall be entitled to recover all reasonable attorneys' and expert witness fees and costs incurred in such action

3.8. TIME. Time is of the essence in this Agreement.

3.9. **CONSENTS AND APPROVALS.** Any consent or approval of the Agency required under this Agreement shall not be unreasonably withheld. Any approval must be in writing and executed by an authorized representative of the Agency.

3.10. **NOTICES, DEMANDS AND COMMUNICATIONS.** Except as otherwise specified herein, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by one of the following methods:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service; or
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a nonbusiness day.

AGENCY: Milpitas Redevelopment Agency
455 East Calaveras Blvd.
Milpitas, California 95035
Attn: Executive Director
Facsimile: (408) 586-3056

OWNER: Apton Properties, L.L.C.
46509 Mission Blvd.
Fremont, CA 94539
Attn: Manager
Telephone: (510) 249-0923
Facsimile: (510) 226-1222

with a copy to: Jeffrey B. Hare
A Professional Corporation
Ten Almaden Blvd., Suite 1250
San Jose, CA 95113-2233
Telephone: (408) 279-3555
Facsimile: (408) 279-5888

3.11. **BINDING UPON SUCCESSORS.** All provisions of this Agreement shall be

binding upon and inure to the benefit of the heirs, administrator, executors, successors-in-interest, transferee, and assigns of Owner, and the Agency, and shall run with the land for the full term of this Agreement, regardless of any conveyance or transfer of the Property or portion thereof.

3.12. RELATIONSHIP OF PARTIES. The relationship of Owner and the Agency for this Project during the term of this Agreement shall not be construed as a joint venture, equity venture, or partnership.

3.13. WAIVER. Any waiver by the Agency of any obligation in this Agreement must be in writing. No waiver will be implied from any delay or failure by the Agency to take action on any breach or default of Owner or to pursue any remedy allowed under this Agreement or any other applicable agreements, or applicable law. Any extension of time granted to Owner to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the Agency to any act or omission by Owner shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

3.14. AMENDMENTS AND MODIFICATIONS. Any amendments or modifications to this Agreement must be in writing, and shall be made only if executed by both Owner and the Agency.

3.15. SEVERABILITY. Every provision of this Agreement is intended to be severable. If any provision of this Agreement shall be held invalid, illegal, or unenforceable by a court of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

[EXECUTION PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereby have executed this Agreement as of the date first written.

AGENCY:

Milpitas Redevelopment Agency

By: _____

Thomas J. Wilson

Its: Executive Director

Attest:

Gail Blalock, Agency Secretary

Approved as to form:

Steven T. Mattas, Agency Counsel

OWNER:

APTON PROPERTIES, a California limited liability company

By:

Its:

EXHIBIT A

Legal Description of the Property

EXHIBIT B

Preliminary Distribution Plan